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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001042-MR

NATALIE TAYLOR — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 15-CI-005716

MIDDLETOWN FIRE
PROTECTION DISTRICT — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: J. LAMBERT, STUMBO, AND TAYLOR, JUDGES.

LAMBERT, J., JUDGE: Natalie Taylor has appealed from the order of the Jefferson Circuit Court dismissing her complaint seeking damages for discrimination against her by the Middletown Fire Protection District (MFPD). Because we hold that the circuit court improperly dismissed the complaint, we reverse the order of dismissal.

Taylor began working for MFPD as a full-time, paid firefighter in October 1996. She had been serving as a junior firefighter and a volunteer firefighter with MFPD from 1991 until being employed. Taylor was promoted over the years and eventually was named Captain in February 2009. She became the President of the local professional firefighter union in January 2014. During her tenure with MFPD, she had only received one written warning prior to November 2014, and that was for failure to properly use the chain of command within MFPD. The circumstances giving rise to the claimed discrimination occurred on November 20, 2014, when Taylor attended an officer's training session that was conducted by Chief Michael Morgan.[1] The participants were asked to share their opinions about different matters, and Taylor did so. Believing that she was in a safe environment, she stated her opinions that the MFPD employees were not being used to the best of their abilities and that there was a disconnect between the command team and the firefighters. After the training, two members of the MFPD command, Assistant Chief Andy Longstreet and Major Bradford Michel, called her in for a meeting, after which Taylor agreed to work with Assistant Chief Longstreet to prepare a short presentation for the next officers' meeting. She believed the matter was resolved.

[1] Chief Morgan was from another fire department.

But on December 3, 2014, the day before the officers' meeting, Taylor was suspended and charged with misconduct. She was charged with making "disparaging, disrespectful and inappropriate remarks about her subordinates, peers, and superior officers of the District" in the presence of the MFPD staff, a violation of MFPD Policies 306.01.III.B and 306.01.V.A.3.c. A second charge indicated that she made the inappropriate remarks after she had previously been instructed by Major Michel on the proper conduct for officers regarding professional communications and the chain of command, a violation of Policy 307.10.III.F. A third charge indicated that she publicly criticized instructions or orders she had received in violation of Policy 307.10.III.G. As a result of the charges, Taylor was immediately locked out of her work computer and e-mail. For her misconduct, Taylor was offered the options to self-demote from Captain to firefighter, to resign, or to proceed with a hearing. Taylor chose to proceed with a hearing.

Taylor remained suspended from her duties as Captain from December 3, 2014, through March 21, 2015, and without pay from February 5 through March 18, 2015. A disciplinary hearing was held on December 17, 2014, January 16, 2015, February 5, 2015, and March 18, 2015. The third charge had

been dismissed previously by agreement, and the MFPD Board of Trustees found charges 1 and 2 to be unsubstantiated. The Board ultimately found in Taylor's favor, and she was awarded back pay.

Taylor believed that MFPD Chief Jeff Riddle did not agree with the opinions she expressed in the training session and that he initiated the disciplinary proceedings against her. She named three other MFPD captains she claimed were not disciplined to the extent she was in support of her disparate treatment claim. After her return to work, Taylor claimed to have been subjected to random and unnecessary reassignments between three stations and instructed to do quality checks on twenty-nine fire runs when she had only been involved with three of those runs. In April 2015, Taylor received an evaluation with negative comments when she had always received favorable evaluation ratings in the past.

As a result, Taylor filed a complaint seeking compensatory damages for gender discrimination and disparate treatment pursuant to Kentucky's Civil Rights Act, Kentucky Revised Statutes (KRS) Chapter 344.

In lieu of an answer, MFPD filed a motion to dismiss Taylor's complaint, arguing that she had not suffered an adverse employment action and had failed to identify any similarly situated individuals and, therefore, failed to state a claim upon which relief could be granted. Taylor objected to the motion. She described the adverse employment actions she claimed she experienced as a

result of having disciplinary charges brought against her and being suspended, including being locked out of her work e-mail and disconnected from her department, denied the opportunity to serve on the hiring committee, denied training opportunities, and denied the opportunity to take advantage of educational reimbursement through MFPD. Her eligibility to attain the rank of Major was also delayed. After her suspension, Taylor stated she was directed to quality check twenty-nine fire runs and was subjected to a negative performance review in April 2015, much of which she claimed was related to the November training meeting. She went on to address other similarly situated captains who were not subjected to the same level of discipline as she was. As a result, Taylor argued that she had established her claim for gender discrimination pursuant to KRS Chapter 344 and that MFPD's motion to dismiss should be denied. By separate filing, Taylor moved the court to schedule a hearing on the motion to dismiss.

On December 21, 2015, Taylor moved the court for leave to amend her complaint to provide more adverse employment actions that were taken against her, as she discussed in her response to MFPD's motion to dismiss. The circuit court granted her motion in January 2016.

On June 22, 2016, following a hearing that was not included in the certified record, the circuit court entered an order granting MFPD's motion to dismiss. The court found that Taylor had not been subjected to adverse

employment actions, recognizing that she had not been demoted, given different job responsibilities, or a reduction in pay or benefits when she returned from her suspension. In addition, the performance review included areas of improvement that predated her suspension and could thus not be considered an adverse employment action. The court went on to hold that the three individuals Taylor identified were not similarly situated to her. Therefore, the circuit court granted MFPD's motion and dismissed Taylor's complaint with prejudice. This appeal now follows.

On appeal, Taylor contends that the circuit court erred in concluding that she had not established a *prima facie* case gender discrimination. She also contends that she had been engaged in protected speech during the training session.

Before we may reach the merits of Taylor's appeal, there are several issues we must address. First, we must agree with MFPD that Taylor's brief is deficient in that she failed to identify how each issue was properly preserved for review and failed to include references to the record, in violation of Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iv) and (v). However, we shall decline MFPD's suggestion that her brief should be stricken, noting the small size of the record and that Taylor referred to documents in the appendix to her brief that had

been included in the certified record.[2] But counsel is cautioned to comply with the Rules in future appeals.

Second, we agree with MFPD that Taylor failed to raise a First Amendment free speech argument below. Therefore, she is precluded from raising this issue for the first time on appeal. "[S]pecific grounds not raised before the trial court, but raised for the first time on appeal will not support a favorable ruling on appeal." *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011).

Finally, we have considered the passed motion of Kentucky Professional Firefighters (KPFF) for leave to file an *amicus curiae* brief in support of Taylor's position pursuant to CR 76.12(7), a matter that is within this Court's discretion. *See Thompson v. Fayette County*, 302 S.W.2d 550, 552 (Ky. 1957). We agree with MFPD that the tendered *amicus curiae* brief duplicates arguments raised by Taylor in her brief, including the First Amendment argument that is not properly before the Court, and is not helpful because it addresses a claim for retaliation that Taylor did not plead. Therefore, we shall deny the passed motion by separate order of the Court.

Our standard of review of a motion to dismiss filed pursuant to CR 12.02 for failure to state a claim upon which relief may be granted is set forth in *Benningfield v. Pettit Environmental, Inc.*, 183 S.W.3d 567, 570 (Ky. App. 2005):

[2] The Court is unable to locate Exhibit 2 of Taylor's brief in the certified record (other than references to it in Taylor's complaint) and therefore shall not consider it.

> A motion to dismiss should only be granted if "it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Pari–Mutuel Clerks' Union v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). When ruling on the motion, the allegations in "the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true." *Gall v. Scroggy*, 725 S.W.2d 867, 868 (Ky. App. 1987). In making this decision, the trial court is not required to make any factual findings. *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002). Therefore, "the question is purely a matter of law." *Id*. Accordingly, the trial court's decision will be reviewed *de novo*. *Revenue Cabinet v. Hubbard*, 37 S.W.3d 717, 719 (Ky. 2000).

With this standard in mind, we shall review the remaining issue in Taylor's brief.

KRS 344.040(1)(a) provides that it is unlawful for an employer to "discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, national origin, sex, [or] age forty (40) and over[.]" In *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492 (Ky. 2005), a case involving age discrimination, the Supreme Court of Kentucky explained the process for establishing a claim for discrimination:

> There are two paths for a plaintiff seeking to establish an age discrimination case. One path consists of direct evidence of discriminatory animus. Absent direct evidence of discrimination, Plaintiff must satisfy the burden-shifting test of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The reasoning behind the *McDonnell Douglas* burden shifting approach is to allow a victim of

> discrimination to establish a case through inferential and circumstantial proof. As Justice O'Connor has noted, "the entire purpose of the *McDonnell Douglas prima facie* case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271, 109 S.Ct. 1775, 1802, 104 L.Ed.2d 268 (1989) (O'Connor, J. concurring); *see also Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613, 622, 83 L.Ed.2d 523 (1985) ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'"). If a plaintiff attempts to prove its case using the *McDonnell Douglas* framework, then the plaintiff is not required to introduce direct evidence of discrimination. *Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 349 (6th Cir. 1997).

Williams, 184 S.W.3d at 495-96. Turning to the burden-shifting formula, once a plaintiff establishes a *prima facie* case, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802. If the employer meets this burden, "the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true intentions, but were a pretext for discrimination." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981).

In *Murray v. Eastern Kentucky University*, 328 S.W.3d 679, 682 (Ky. App. 2009), this Court set forth the elements of a gender discrimination claim as

follows: "(1) she was a member of a protected group; (2) she was subjected to an adverse employment action; (3) she was qualified for the position; and (4) 'similarly situated' non-protected employees were treated more favorably." Regarding the fourth element, the Court stated that "[w]hen determining what employees were 'similarly situated,' the plaintiff must find those that are similar to her in 'all relevant aspects.'" *Id*. *See also Board of Regents v. Weickgenannt*, 485 S.W.3d 299, 306 (Ky. 2016). There is no dispute that Taylor was a member of a protected class (1) and that she was qualified for her position as Captain (3). Our analysis centers on the remaining two elements: namely, whether Taylor was subjected to an adverse employment action and whether similarly situated employees were treated more favorably. We hold that the circuit court erred in finding that Taylor had failed to establish these two elements.

We shall first address Taylor's argument that similarly situated, non-protected employees were treated more favorably. Taylor contends that the Supreme Court of Kentucky's new opinion in *Weickgenannt*, *supra*, somehow changes that standard for identifying similarly situated males. We disagree.

> In identifying suitable comparators, we must select individuals who are "similarly situated in all relevant aspects." Indeed, Weickgenannt must present evidence that "all relevant aspects of [her] employment situation are nearly identical to those of the employees who [s]he alleges were treated more favorably." To us, the appropriate standard in our search for comparators should be bifurcated: a comparator must be both of similar

> qualification to Weickgenannt and must have been subject to the same reviewers and application process at or about the same time. [Footnotes omitted.]

Id. at 308. However, we agree with Taylor that she has successfully established that at least one of the men she named met the necessary criteria.

One of the men identified by Taylor, Captain Mark Carnes, fits the definition of a similarly situated, non-protected employee who was treated more favorably than Taylor. He was a male captain who allegedly disparaged a superior officer in front of MFPD personnel. Taylor is a female captain who allegedly disparaged a superior officer in front of MFPD personnel. Carnes was asked to take a single-rank demotion to Sergeant and accept a 10-shift suspension without pay. Taylor was asked to take a two-rank demotion to firefighter.

Therefore, Taylor and Carnes are similarly situated in "all relevant aspects," *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998), and Carnes was treated more favorably. The circuit court and MFPD made much of the fact that Taylor's statement was made in public and that, therefore, she and Carnes are not similarly situated. We disagree. According to the scant information in the record, the training session was for MFPD personnel only and the only person present who was not a member of the MFPD was Chief Morgan, who was moderating the event. Chief Morgan is himself a member of a fire department, and his presence at the training session does not constitute a "relevant

aspect" sufficient enough to find Taylor and Carnes were not similarly situated. This did not seem to be a public event, but an event held for MFPD employees.

Accordingly, the circuit court erred as a matter of law in finding that Taylor failed to establish the similarly-situated element of her gender discrimination claim.

We shall next address whether Taylor met the second prong of the test; whether she was subjected to an adverse employment action. In order to prove this prong, Taylor must establish "a materially adverse change in the terms of her employment." *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 885 (6th Cir. 1996).

> In *Crady v. Liberty National Bank & Trust Co. of Indiana*, 993 F.2d 132, 136 (7th Cir. 1993), the Seventh Circuit explained the requirements for establishing a materially adverse employment action in the context of an age discrimination case:
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> > [A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

Hollins v. Atlantic Co., Inc., 188 F.3d 652, 662 (6th Cir. 1999).

In the present case, Taylor did not lose her job, was awarded full back pay after her suspension ended, was returned to her same position as Captain, and all charges were removed from her employment file. Nevertheless, Taylor alleges a number of adverse employment actions in her complaint: three reassignments in nine months; loss of access to MFPD e-mail system; being required to perform 29 quality checks; loss of educational reimbursement; missed training opportunities; the inability to serve on the hiring committee; an unfavorable performance review; and the delay or denial of a promotion. It appears that these actions taken against Taylor are more than just "mere inconvenience." Because there has been no discovery in this case, neither this Court nor the circuit court have sufficient information to determine whether these actions, either individually or collectively, constitute a materially adverse change in the terms of her employment. Is it unusual to receive three reassignments within nine months? Can a person quality check a fire run without having been on that run? Was Taylor given the opportunity to receive the educational reimbursement or make up the missed training opportunities? Is serving on a hiring committee prestigious in that it might help her career? Was Taylor's promotion delayed by these events?

Based upon the standard of review set forth above, we agree with Taylor that she may be entitled to relief based upon the allegations she has made. *See Benningfield v. Pettit Environmental, Inc.*, *supra*. On remand, the parties will

have the opportunity to take discovery on the issue of whether Taylor was subjected to an adverse employment action. In reaching this decision and permitting discovery on this issue, this Court offers no opinion as to whether Taylor may be able to successfully establish this element.

For the foregoing reasons, the order of the Jefferson Circuit Court is reversed, and this matter is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

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